

**UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS**

In re:)	MDL No. 1456
)	Civil Action No. 01-12257-PBS
PHARMACEUTICAL INDUSTRY)	Subcategory No. 06-11337
AVERAGE WHOLESALE PRICE)	
LITIGATION)	Hon. Patti B. Saris
_____)	

THIS DOCUMENT RELATES TO:

United States ex rel. Ven-A-Care of the)	
Florida Keys, Inc. v. Schering Corporation,)	
Schering-Plough Corporation and)	
Warrick Pharmaceuticals Corporation)	
Civil Action No. 09-CV-10547)	
MDL Action No. 1456)	
)	
United States ex rel. Ven-A-Care of the)	
Florida Keys, Inc. v. Schering Corporation,)	
Schering-Plough Corporation and)	
Warrick Pharmaceuticals Corporation)	
Civil Action No. 00-CV-10698)	
MDL Action No. 1456)	
)	
California ex rel. Ven-A-Care of the)	
Florida Keys, Inc. v. Schering Corporation,)	
Schering-Plough Corporation and)	
Warrick Pharmaceuticals Corporation)	
Civil Action No. 03-CV-11226)	
MDL Action No. 1456)	

**SETTLING PARTIES' JOINT RESPONSE TO MOTIONS TO INTERVENE AND TO
OTHERWISE PARTICIPATE IN SETTLEMENT PROCEEDINGS**

Relator Ven-A-Care of the Florida Keys (the "Relator"), the State of California, and Schering-Plough Corporation, Schering Corporation, and Warrick Pharmaceuticals Corporation (collectively "Schering/Warrick") submit this joint response to the following filings by government entities who are non-parties to the above styled actions: (i) Commonwealth of

Massachusetts' Motion to Intervene for the Limited Purpose of Objecting to the Ven-A-Care/Schering/Warrick Settlement Agreement filed on July 22, 2009 [Docket No. 6275]; (ii) The City of New York and New York Counties' Motion to Intervene for the Limited Purpose of Objecting to the Ven-A-Care/Schering/Warrick Proposed Settlement filed on July 23, 2009 [Docket No. 6288]; and (iii) Letter/Request (Non-Motion) from Wisconsin Attorney General's Office re: Motion for Leave to File *Amicus* filed on July 23, 2009 [Docket No. 6284].¹ The government entities seeking to be heard will be referred to herein collectively as the "Non-Party State or Local Governments."

RESPONSE

The Settling Parties agree that the Non-Party State or Local Governments should be permitted to participate in the proceedings before this Court as they relate to the Settlement Agreement, either as amicus as requested by the State of Wisconsin and allowed by this Court, or in their capacities as parties to the MDL proceedings over which this Court presides. The Settling Parties object to the Non-Party State or Local Governments being granted intervenor status because this has been expressly prohibited by Congress in the federal False Claims Act ("FCA").² In relevant part, 31 U.S.C. § 3730(b)(5) provides as follows:

When a person brings an action under this subsection, no person other than the Government may intervene or bring a related action based on the facts underlying the pending action.

The Settling Parties respectfully submit that the statute could not be clearer – intervention is not permitted in a federal FCA case brought by a relator, except by the United

¹ The Settling Parties recognize that, on August 5, 2009, this Court allowed Wisconsin's Letter/Request to file an amicus brief in connection with the Court's review of their proposed settlement.

² The California False Claims Act also provides that only the Attorney General or local prosecuting authority may intervene. Cal. Gov't Code § 12652(a)(3). Similarly, Florida's False Claims Act provides, "When a person files an action under this section, no person other than the department on behalf of the state may intervene or bring an action under this section based on the facts underlying the pending action." Fla. Stat. §68.083(7).

States government, which has declined to intervene in this case. That said, consistent with this Court's prior practice in the MDL of inviting non-parties with a specific interest in a particular issue to submit amicus briefs, the Settling Parties agree that the Non-Party State or Local Governments, as well as other states whose cases are not before this Court that may request to be heard, should be permitted to participate in the proceedings relating to the Settlement Agreement as amici.

CONCLUSION

The Settling Parties respectfully request that the motions to intervene filed by the Non-Party State or Local Governments be denied, but that they be permitted to participate in the proceedings on the Settlement Agreement as amicus or as parties already within the MDL.

Respectfully submitted,

/s/ John P. Bueker
John T. Montgomery
John P. Bueker
Ropes & Gray LLP
One International Place
Boston, MA 02110-2624
(617) 951-7000

John P. McDonald
Locke Lord Bissell & Liddell
2200 Ross Avenue, Suite 2200
Dallas, TX 75201

Attorneys for Schering Corporation,
Schering-Plough Corporation and
Warrick Pharmaceuticals Corporation

/s/ James J. Breen
James J. Breen
Alison W. Simon
The Breen Law Firm, P.A.
P.O. Box 297470
Pembroke Pines, FL 33029-7470
(954) 874-1635

Attorneys for Ven-A-Care of the
Florida Keys, Inc.

/s/ Nicholas N. Paul
Nicholas N. Paul
Supervising Deputy Attorney General
Bureau of Medi-Cal Fraud and Elder Abuse
Office of the Attorney General
1455 Frazee Road, Suite 314
San Diego, CA 92108

Attorney for the State of California

Dated: August 7, 2009

CERTIFICATE OF SERVICE

I hereby certify that on August 7, 2009, a true copy of the above Joint Response was served on all counsel of record by electronic service pursuant to Case Management Order No. 2 entered by the Honorable Patti B. Saris in MDL 1456.

August 7, 2009

/s/ John P. Bueker
John P. Bueker